

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

ABLE ROLLING STEEL DOOR, INC.

Employer,

and

**INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL,
ORNAMENTAL AND REINFORCING
IRON WORKERS, AFL-CIO,**

Petitioner.

Case No. 22-RC-265289

EMPLOYER'S REQUEST FOR REVIEW

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ATTORNEYS FOR
ABLE ROLLING STEEL DOOR, INC.

Pursuant to Section 102.67 and 102.69 of the Rules and Regulations of the National Labor Relations Board (the “Board”), the Employer, Able Rolling Steel Door, Inc. (the “Employer”), by and through its undersigned counsel, hereby files this Request for Review of the Acting Regional Director of Region 22’s January 25, 2021 Decision on Objections and Certification of Representative (“Decision”). Compelling reasons exist for the Board’s intervention on the following grounds:

1. A substantial question of law and policy is raised because of the absence of Board precedent and/or the Acting Regional Director’s departure from officially reported Board precedent in overruling the Employer’s Objections, which constituted an abuse of discretion; and
2. The Acting Regional Director’s refusal to convene a hearing concerning the Employer’s timely-filed objections prejudicially affects the Employer’s due process rights.

As to Objection 1, the Acting Regional Director incorrectly determined that the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO’s (“Union”) Delegate, Bob Cosgrove, did not engage in objectionable conduct. The Employer’s offer of proof clearly established that, after the Region mailed ballots to eligible voters, Mr. Cosgrove approached an eligible voter, Eli Manoatl-Mazatzi, near the Employer’s parking lot, referred to Mr. Manoatl-Mazatzi by name, did not reveal how he knew Mr. Manoatl-Mazatzi’s name, and then inquired about the election and how Mr. Manoatl-Mazatzi intended to vote.

The Acting Regional Director incorrectly discounted this offer of proof in failing to direct a hearing to allow a true factual record to be developed concerning this objectionable conduct and its impact on employee free choice. Moreover, as discussed herein, the authority the Acting Regional Director relied upon to overrule Objection 1 is inapposite and fails to take into account the unique electioneering pitfalls germane to mail ballot elections.

As to Objection 2, the Acting Regional Director ignored the Employer's offer of proof that Mr. Cosgrove's objectionable conduct was the proximate cause of Mr. Manoatl-Mazatzi's decision to intentionally return a voided mail ballot. Thus, the Acting Regional Director denied the Employer its due process rights by precluding it from developing a factual record to establish that Mr. Cosgrove's conduct objectively caused Mr. Manoatl-Mazatzi to intentionally not exercise his right to vote in the election.

* * *

Accordingly, given the Acting Regional Director's decision to deny the Employer its due process rights, the Employer respectfully requests that the Board grant the Employer's Request for Review and direct a second election based upon the Union's objectionable conduct which destroyed laboratory conditions for a free election.

I. STATEMENT OF THE CASE

On August 26, 2020, the Union filed a petition for an election at the Employer's South Hackensack, New Jersey site. (Decision, at 1). On September 10, 2020, the then-Regional Director approved the parties Stipulated Election Agreement, agreeing to the following voting unit:

All full-time and regular part-time installation/service employees employed by the Employer at its South Hackensack, New Jersey facility excluding office clerical employees, professional employees, managers, guards and supervisors as defined in the National Labor Relations Act and all other employees.

(Decision, at 1).

On September 16, 2020, the Regional Office mailed ballots to eligible voters. (Decision, at 1). Ballots were due to be mailed back to the Regional Office by October 7, 2020. (Decision, at 1). On October 28, 2020, the Regional Office conducted a ballot count with the following results: three votes for the Union, zero votes against the Union, two void ballots, and

one challenged ballot. (Decision, at 1). On November 4, 2020, the Employer timely filed its Objections.

These Objections stated as follows:

1. In the relevant time period leading up to and during the mail ballot election, the Union, by and through its agents, engaged in objectionable conduct by improperly electioneering to eligible voters with the intent of preventing them from exercising freedom of choice in the election.
2. In the relevant time period leading up to and during the mail ballot election, the Union, by and through its agents, engaged in objectionable conduct by improperly intimidating/coercing eligible voters, inquiring about their union sentiments, and creating an atmosphere of fear, thereby destroying laboratory conditions for a fair election.¹

On January 25, 2021, the Acting Regional Director issued the Decision overruling the Employer's Objections. This Request for Review ensued.

II. ARGUMENT – THE ACTING REGIONAL DIRECTOR ERRED BY FAILING TO DIRECT A HEARING AND BY OVERRULING THE EMPLOYER'S OBJECTIONS

The Acting Regional Director should have directed a hearing concerning the Employer's Objections. Failing to do so, in the face of legitimate claims of voter coercion, deprived the Employer of its due process rights. Moreover, had the Employer been able to establish a factual record, the evidence would have clearly established that the Union engaged in objectionable conduct which destroyed laboratory conditions for a fair election.

A. The Board's Laboratory Conditions Framework

“At all times, the Board's paramount concern has been, and still is, assuring employees full and complete choice in selecting a bargaining representative.” See Kalin

¹ The Decision shortens the description of the Employer's Objections. (Decision, at 1-2). The Employer requests that the Board review the instant description as the accurate recitation of the Employer's Objections. Additionally, the Objections were accompanied by an Offer of Proof which should be deemed as part of the record because it was considered by the Acting Regional Director.

Construction Co., 321 NLRB 649, 651 (1996). One of the hallmark cases in this area is General Shoe Corp., 77 NLRB 124, 127 (1948) where the Board held:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

Following these principles, in Milchem, Inc., 170 NLRB 362 (1968), the Board established a bright-line rule prohibiting parties from engaging in "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots...." The Board's concern was "the potential for distraction, last minute electioneering or pressure, and unfair advantage" and stressed that the "final minutes before an employee casts his vote should be his own, as free from interference as possible." Id. Of particular importance here, the Board applies the Milchem rule "without inquiry into the nature of the conversations." Id. Critically, "[i]mplicit in the ... Milchem rules is the Board's judgment that conduct that is otherwise unobjectionable can disturb laboratory conditions if it occurs during, or immediately before, the election." Kalin Construction, 321 NLRB at 651.

B. Objection #1 Should Have Been Sustained

As the Board is well aware, the COVID-19 pandemic has made mail ballot elections the rule, not the exception. That means that polling periods last for days, not hours. That also means that the "final minutes" referred to in Milchem should be construed to last the entirety of the balloting period because an employee could theoretically mark a ballot and place it in the mail at any point therein. Employees should thus be free from Union electioneering during the entirety of this period to ensure laboratory conditions are maintained. In fact, the Board has noted the

importance of timing issues in connection with mail ballot elections. In Guardsmark, 363 NLRB No. 103 (2016), the Board ruled that captive audience meetings must cease 24 hours prior to the time before mail ballots are mailed to eligible voters. The Board noted that the employer “was free to hold a mass meeting up until 3 p.m. on January 27 [(the day before the ballots were scheduled to be mailed)] to convey its intended message.” Id. (emphasis added). Thus, according to the Board, captive audience meetings could likewise not be held *after* the ballots were mailed and during the balloting period. As a result, Guardsmark supports the notion that union electioneering should likewise not continue after ballots are mailed to eligible voters.

In the present case, the Acting Regional Director ignored that Mr. Cosgrove approached Mr. Manoatl-Mazatzi near the Employer’s parking lot after the Region mailed the ballots. Mr. Cosgrove did not identify how he knew Mr. Manoatl-Mazatzi’s name and then went on to inquire about his union sentiments. Had the Employer been offered due process and afforded a hearing, it would have demonstrated that, contrary to the Acting Regional Director’s non-evidentiary based conclusions, this prolonged conversation violated the Milchem rule. To that end, because Milchem does not require an examination of the contents of the conversation, the Acting Regional Director’s erroneous finding that there may not have been a “contention [or] ... evidence provided that Cosgrove’s inquiry was accompanied by any threats of reprisal or other coercive statements” is of no moment. (Decision, at 2). Rather, it is the undisputed fact that this conversation took place during the election period itself that makes it objectionable. And, that fact is precisely what distinguishes the instant case from the authority the Acting Regional Director relied upon in the Decision. In both Springfield Hospital, 281 NLRB 643, 692-693 (1986) and JC Penney Food Department, 195 NLRB 921, 924 n. 4 (1972), the alleged objectionable conduct committed by

union officers/agents occurred before the elections in those cases commenced. Neither of those cases considered Milchem's teachings and are thus inapplicable.

Accordingly, the Board should grant the Request for Review and sustain Objection #1. In the alternative, the Board should direct the Acting Regional Director to conduct a hearing to ensure the Employer's due process rights are not deprived.

C. Objection #2 Should Have Been Sustained

In overruling Objection #2, the Acting Regional Director stated that "the Employer's submission merely asserts that the employee was approached by Cosgrove and they engaged in a routine discussion about the employee's feelings towards the Union." (Decision, at 2-3). That description mischaracterizes the Employer's offer of proof which, again, noted that Mr. Cosgrove approached Mr. Manoatl-Mazatzi near the Employer's parking lot, referred to Mr. Manoatl-Mazatzi by name, did not reveal how he knew Mr. Manoatl-Mazatzi's name, and then inquired about the election and Mr. Manoatl-Mazatzi's union sentiments. *There is nothing routine about a scenario where a stranger approaches an eligible voter, announces the eligible voter's name without providing any context as to why the stranger knows the eligible voter's name, and then inquires about union sentiments.*

Worse, because the Acting Regional Director improperly refused to conduct a hearing on this Objection, the Employer was deprived an opportunity to show the causal connection between Mr. Cosgrove's conduct and Mr. Manoatl-Mazatzi's objective fear which ultimately caused him to return an intentionally voided ballot. The evidence which would have been adduced at hearing would have established that Mr. Cosgrove's conduct was that proximate cause. It was thus pure *ipse dixit* for the Acting Regional Director to summarily conclude the Employer "offered nothing beyond its mere assertion that Cosgrove said anything that could be

construed as coercive.” (Decision, at 3). A factual hearing would have permitted the Employer to introduce such evidence.

Notably, relying on General Shoe, discussed supra, the Board affirmed a Hearing Officer’s decision in New York Shipping Association, 108 NLRB 135, 158 (1954) which found that the fact that “a potential voter might be intimidated only ‘to the extent of scaring him away from the polls...,’ is reason enough to set aside the election.” The Hearing Officer noted that “[t]he Board never requires proof, either in unfair labor practice cases or election cases, that given individuals have been in fact coerced by improper conduct; it is sufficient that the conduct found improper be such as to have a tendency to coerce.” Id. In this regard, “[o]nce it is shown that an election was conducted under such circumstances as to deter any voters from expressing their free choice, the results of the entire election must be canceled out.” Id.

New York Shipping Association is instructive to the present case. In overruling Objection #2, the Acting Regional Director stated “[d]isputes between Union delegates and employees that are unrelated to the election and a delegate attempting to seek an employee’s support through non-coercive means does not constitute conduct that would interfere with the free exercise of employee rights under the Act.” (Decision, at 3) citing Cedars-Sinai Medical Center, 342 NLRB 596, 597 (2004). This was not a case where Mr. Cosgrove had a conversation with an eligible voter about the outcome of a football game. *It was directly related to the election, and after the election had commenced.* Nevertheless, the Board in Cedars-Sinai noted that it uses an objective standard to determine whether are not conduct has “the tendency to interfere with the employees’ freedom of choice.” Id. (internal citations omitted). Thus, the Acting Regional Director cannot dispute that Cedars-Sinai stands for the same proposition as New York Shipping

Association and General Shoe, discussed supra, concerning objectionable conduct which directly inhibits employees from exercising their free choice in an election.

The evidence adduced at hearing would have shown how Mr. Cosgrove's conduct *objectively* served to deter at least one voter from expressing his free choice. There would be no reason to intentionally submit a void ballot unless Mr. Manoatl-Mazatzi was concerned that the Union would find out how he voted. And, that is particularly true given the small unit size and the very close ballot total (the combined number of void and challenged ballots equaled the number of votes for the Union). As a result, the Board should grant the Request for Review and sustain Objection #2. In the alternative, to avoid a miscarriage of justice, the Board should direct the Acting Regional Director to conduct a hearing to ensure the Employer's due process rights are preserved.

III. CONCLUSION

For the foregoing reasons, the Acting Regional Director's Decision should be reversed and a new election be directed in light of the Union's objectionable conduct. Alternatively, the Board should direct the Acting Regional Director to convene a hearing concerning the Employer's Objections.

Respectfully submitted,

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New York, NY 10017

/s Daniel Schudroff
Daniel D. Schudroff

ATTORNEYS FOR ABLE ROLLING STEEL DOOR, INC.

Dated: February 8, 2021

CERTIFICATE OF SERVICE

Case Name: Able Rolling Steel Door, Inc.
Case No.: 22-RC-265289

I hereby certify that, on February 8, 2021, I caused a true and correct copy of the **REQUEST FOR REVIEW** in connection with Case Number 22-RC-265289 to be served upon counsel of record for International Association of Bridge, Structural, Ornamental and Reinforcing Iron Worker, AFL-CIO, Michael Evans, via e-mail at mevans@hrjlaw.com and upon the Acting Regional Director for Region 22 of the National Labor Relations Board, Richard Fox, via e-mail at richard.fox@nlrb.gov.

/s Daniel Schudroff
Daniel D. Schudroff